IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34892

DENNIS E. ABBOTT,	)	**2009 Unpublished Opinion No. 566**
	)	
Plaintiff-Appellant,	)	**Filed: August 10, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
RANDY BLADES, Warden, SGT. WALLACE, c/o ALLISON NIELSON, LT. DANIEL BROMLEY,	)	**THIS IS AN UNPUBLISHED OPINION AND SHALL NOT BE CITED AS AUTHORITY**
	)	
Defendants-Respondents.	)	
	)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Cheri C. Copsey, District Judge.

Order denying motion for default judgment and order granting summary judgment, affirmed.

Dennis E. Abbott, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Mary K. Magnelli, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Dennis E. Abbott appeals from the district court's denial of his motion for default judgment and grant of summary judgment dismissing his constitutional and tort claims. We affirm.

I.
FACTS AND PROCEDURE

Abbott, an inmate in the custody of the Idaho Department of Correction (the Department) filed a complaint against several Department employees (Respondents) on July 6, 2007, alleging a violation of his due process rights and conversion and defamation tort claims. The claims arose from his allegation that prison staff failed to forward his hobby craft magazine after he had moved to a different unit. Abbott filed a motion for default judgment, and the Respondents filed

a motion to dismiss the action, alleging improper service of the complaint. The district court denied both motions, and the Respondents subsequently filed an answer.

Thereafter, the Respondents filed a motion for summary judgment, arguing that there existed no genuine issue of material fact and that Abbott had failed to state a claim upon which relief could be granted because his federal rights had not been violated and he had not complied with the notice and bond requirements of the Idaho Tort Claims Act (ITCA). The district court granted the Respondents' motion for summary judgment and awarded attorney fees to the Respondents ruling that Abbott's action was frivolous and failed to state a claim upon which relief could be granted.

Abbott filed a motion for reconsideration, which the district court denied. He then filed a notice of appeal, including a request for partial waiver of transcript fees. The district court denied the request.

II.

ANALYSIS

A. Partial Waiver of Transcripts on Appeal

We first address Abbott's contention that the district court erred in denying his motion for partial waiver of transcript fees. The district court denied Abbott's motion for partial waiver of transcript fees on appeal in a written decision, stating:

> Indigent prisoners can seek to have their court fees waived under I.C. § 31-3220A which states "If the court finds that the prisoner is an indigent prisoner, the court may order that action to proceed without payment of any court fees." The key is whether the prisoner is "indigent."
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> The term "indigent prisoner" is defined in I.C. § 31-3220A(1)(b) as " . . . a prisoner who has *no funds* in his inmate account for the twelve (12) months preceding filing of the action, or the period of incarceration, whichever is less." (Emphasis added). To demonstrate indigency, the prisoner must file an affidavit of inability to pay court fees and a certified copy of his inmate account reflecting the activity in such account over the period of his incarceration or the past twelve months, whichever is less. *See* I.C. § 31-3220A(2)(b), (c).
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> In this case, Abbott filed the inmate account information and an affidavit. These documents reflect that Abbott has the ability to pay the filing fee and any other fees associated with this appeal. According to both documents, Abbott has had substantial funds available to him.
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> Abbott received payment of $4,000 on February 14, 2007, and on April 11, 2007, another $3,000 to his inmate account.
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> Thus, Abbott's average monthly deposits were **$516.71** for the past twelve month period. *See* I.C. § 31-2220A. Likewise, the average daily balance for 6

> months before this litigation was **$2,345.65**. *Id*. The amount of **$469.13** reflects 20% of the average monthly deposits. *Id*. He currently has nearly $600 in his inmate account.
>
> Therefore, in an exercise of discretion, the Court finds Dennis E. Abbott is not entitled to a partial payment of fees and, therefore, denies his Motion.

We note that in rendering its decision, the district court did not apply the version of I.C. § 31-3220A in effect at the time. Rather, the court applied the version of the statute in effect prior to the legislature's amendment of the statute in 2002. However, even assuming the denial of partial waiver of transcripts was error, it is of no consequence to Abbott's instant appeal because the transcripts are not needed where the issues raised involve solely questions of law. *See Bernard v. Roby*, 112 Idaho 583, 733 P.2d 804 (Ct. App. 1987) (The decision to dismiss the appeal when the transcripts are not provided was an abuse of discretion where the appeal included questions of law that could be decided without the transcripts.). We therefore consider Abbott's issues on appeal on the merits.

B. Motion for Default

Abbott contends that the district court erred in denying his motion for default judgment. We review a district court's grant or denial of a motion for default for abuse of discretion. *Mastrangelo v. Sandstrom, Inc.*, 137 Idaho 844, 849-50, 55 P.3d 298, 303-04 (2002); *McKinney v. State*, 133 Idaho 695, 704, 992 P.2d 144, 153 (1999); *Johnson v. State*, 112 Idaho 1112, 1114, 739 P.2d 411, 413 (Ct. App. 1987). In exercising its discretion, the district court may consider factors such as the reasons for the failure to respond, the adequacy of notice, whether the non-defaulting party has been substantially prejudiced by the delay, and the merits of the underlying claim for relief. *McKinney*, 133 Idaho at 704, 992 P. 2d at 153; *Johnson*, 112 Idaho at 1114, 739 P.2d at 413.

In his brief to this Court, Abbott states that the district court denied his motion for default because, according to the district court, "the Appellant was suing the state and that the Idaho Court Rules didn't apply to the state as it would if the defendants would be citizens of the state."

In an order denying Abbott's motion for "Permission to File an Interlocutory Appeal" from the denial of his motion for default, the district court stated that "[c]ontrary to Abbott's contention the Court did not state that the rules do not apply to the State. The district court simply pointed out to Abbott that the rules provide a different method for effecting service on a State entity than on an individual."

Idaho Rule of Civil Procedure 4(d)(5) states that

> [u]pon the state of Idaho, or any agency thereof, service shall be made by delivering two (2) copies of the summons and complaint to the attorney general or any assistant attorney general. . . . In all actions brought under specific statutes requiring service to be made upon specific individuals or officials, service shall be made pursuant to the statute in addition to service as provided above.

In addition, as required by Rule 4(d)(5), the unique service requirements of the ITCA must also be complied with given that Abbott alleged state law tort claims in his complaint. The relevant statute provides that "in all actions under this act against the state or its employee the summons and complaint shall be served on the secretary of state with a copy to the attorney general. . . ." I.C. § 6-916. Thus, for Abbott to have perfected service, he would have had to personally serve both the secretary of state and the attorney general or an assistant attorney general.

According to Abbott, the service of process was initially accomplished by his mailing the complaint and summons to the Idaho Department of Corrections on May 22, 2007, and again by the delivery by a process server, Elizabeth Drennon, of the complaint and summons to the Respondents on July 20, 2007. In her amended affidavit, Drennon stated that "[s]ervice was accepted by Joy, the secretary at the front desk on behalf of the department's attorney generals [sic]" and that according to "Joy," because "none of the attorney generals [sic] were in, she would accept service and see that they received the complaint."

We first note that the neither the Idaho Rules of Civil Procedure, nor the ITCA provide for service of process by mail. Thus, Abbott's act of mailing the complaint and summons to the Department did not trigger the Respondents' obligation to respond. Drennon's second attempt at service of process was legally deficient, where personal service was not accomplished on the state attorney general or any assistant attorney general. The service upon a front desk secretary does not meet the requirements for service of process on the state attorney general or any assistant attorney general. Thus, there was ample evidence that Abbott did not complete adequate service of process.

In addition, Abbott has not identified any unfair prejudice resulting specifically from the delay in the filing of Respondents' answer to the complaint. *See Johnson*, 112 Idaho at 1115, 739 P.2d at 414. Considering these factors, we conclude that the district court did not abuse its discretion in denying Abbott's motion for default judgment.

C. Summary Judgment

Abbott also argues that the district court erred in granting the Respondents' motion for summary judgment. We first note that summary judgment under I.R.C.P. 56(c) is proper only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. On appeal, we exercise free review in determining whether a genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *Edwards v. Conchemco, Inc.*, 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986). When assessing a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991); *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994).

The party moving for summary judgment initially carries the burden to establish that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct. App. 1992). The burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994). Such an absence of evidence may be established either by an affirmative showing with the moving party's own evidence or by a review of all the nonmoving party's evidence and the contention that such proof of an element is lacking. *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct. App. 2000). Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56(f). *Sanders*, 125 Idaho at 874, 876 P.2d at 156.

The United States Supreme Court, in interpreting Federal Rule of Civil Procedure 56(c), which is identical in all relevant aspects to I.R.C.P. 56(c), stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element

> of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (citations omitted). The language and reasoning of *Celotex* has been adopted in Idaho. *Dunnick*, 126 Idaho at 312, 882 P.2d at 479.

Abbott advances claims in two general categories--due process claims and tort claims. We address them in turn.[1]

1. Due Process Claims

In his complaint, in regard to his due process claim, Abbott stated:

> Due process claim resulted in Defendant Nielson no[t] complying with (Division of Prisons - Institutional Mail - Directive Number 402.02.01.001 pg. 10 ph. 2,
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> "When an inmate is transfered [sic] to a different housing unit or institution, mail will be forwarded for a period of sixty (60) days from the last date of transfer. After the (60) day limit, the mail may be returned to the sender."
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> Plaintiff's mail . . . was delivered to his former housing unit 2-weeks [sic] after he was moved to another unit, and because plaintiff was not to receive his mail, defendant Nielson gave his mail to one of her unit (inmate) workers to enjoy. Defendant Nielson refused to forward plaintiff's mail to the unit in which he was moved just two weeks prior.

In granting the state's motion for summary judgment, the district court focused solely on Abbott's allegations that the Department failed to investigate his grievances regarding the handling of his mail. And while Abbott did make reference to the Department's failure to investigate his grievance, such indications were made in the context of his overall claim that the Department erred in failing to follow its own policies and depriving him of his mail. Thus, we focus our inquiry on both grounds.

To determine whether an individual's due process rights under the Fourteenth Amendment have been violated, courts must engage in a two-step analysis. A court must first

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[1] For the first time in his supplemental brief to this Court, Abbott states, in the midst of his due process allegation, that the deprivation of his mail due to a violation of Department mail policy implicates the First Amendment. Generally, issues not raised below may not be considered for the first time on appeal. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991). An exception exists if an error is fundamental. *State v. Yakovac*, 145 Idaho 437, 442, 180 P.3d 476, 481 (2008). We can ascertain no authority for the proposition that the misdelivery of mail implicates a fundamental right and thus, we do not address this basis on appeal. *See id*.

decide whether the individual's threatened interest is a liberty or property interest under the Fourteenth Amendment. *See Maresh v. State of Idaho Dep't of Health and Welfare*, 132 Idaho 221, 226, 970 P.2d 14, 19 (1998). *See also True v. Dep't of Health and Welfare*, 103 Idaho 151, 645 P.2d 891 (1982). Only after a court finds a liberty or property interest will it reach the next step of analysis in which it determines what process is due. *See Maresh*, 132 Idaho at 226, 970 P.2d at 19. In this case, since "[t]he requirements of procedural due process apply only to the deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property," the existence of Abbott's right to due process protections regarding delivery of his mail depends on whether his interest is within the scope of the liberty or property language of the Fourteenth Amendment. *Maresh*, 132 Idaho at 226, 970 P.2d at 19.

The United States Supreme Court addressed a remarkably similar situation in *Parratt v. Taylor*, 451 U.S. 527 (1981), where an inmate alleged that he had been deprived of property and due process of law where, after certain hobby materials that he had ordered by mail were delivered to the prison, they were lost when the institution's normal procedure for receipt of mail packages was not followed. The court concluded that the inmate had not alleged a violation of the Due Process Clause of the Fourteenth Amendment, because while he had been deprived of property under color of state law, the deprivation had not occurred as a result of established state procedure. In fact, the deprivation occurred as a result of the unauthorized failure of agents of the state to follow established state procedure. *Id*. at 543. The court then noted that there had been no allegation that the procedures themselves were inadequate, nor that it was practicable for the state to have provided a predeprivation hearing. *Id*. Finally, the court relied on the fact that the state at issue provided an alternate remedy to persons who believed they had suffered a tortious loss at the hands of the state, and the inmate had not utilized that procedure. *Id*. The court concluded that the remedies provided could have fully compensated the respondent for the property loss he suffered, and therefore they were sufficient to satisfy the requirements of due process. *Id*. at 544. Likewise, Abbott's alleged deprivation occurred because of a deviation from the Department's mail policy--not because of it. And, as in *Parratt*, there existed alternate remedies through which Abbott could pursue compensation for his loss--namely the ITCA.

Abbott's due process claim for failure to investigate is also without merit. Most recently, the Appellate Court of Connecticut relied on language in the United States Supreme Court decision *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005), to conclude that even if a

plaintiff could show an entitlement to an investigation, it would not find a property interest in such an entitlement, because an entitlement to process cannot constitute a property interest within the meaning of the Due Process Clause. *Morgan v. Bubar*, ___ A.2d ___, ___ (Conn. App. Ct. 2009). *See also Priller v. Town of Smyrna*, 430 F. Supp. 2d 371 (D. Del. 2006) (holding that, where plaintiff contended her due process rights were violated by the town's failure to investigate an alleged rape, that she had neither a property nor a liberty interest in an investigation); *Niziol v. Pasco County Dist. Sch. Bd*., 240 F. Supp. 2d 1194, (M.D. Fla. 2002) (holding that defendants' failure to investigate does not give rise to a procedural due process claim).

Even assuming that Abbott had advanced a claim that he had a property interest that implicated due process in an investigation of his grievance, such a claim would fail. Evidence in the record--in the form of his written grievances on the matter and the corresponding responses from Department officials--indicates that the Department did, in fact, look into Abbott's claims and addressed his concerns. Abbott fails to show that a more extensive "investigation" is required.

We conclude there did not exist a genuine issue of material fact as to whether Abbott had been deprived of due process and therefore, the court did not err in granting summary judgment on Abbott's due process claim.

2. Tort Claims

Abbott also contends that the district court erred in dismissing his claims of defamation and damage to property. In granting the Respondents' motion for summary judgment on these claims, the district court found them to be tort claims which triggered the applicability of the Idaho Tort Claims Act (ITCA) and since Abbott failed to abide by the mandatory notice and bond requirements of the Act, his claim was barred.

The ITCA requires all claims against a political subdivision arising under the provisions of the Act to be presented to and filed with the clerk or secretary of the political subdivision. I.C. § 6-906. The claim-filing statute is usually the only sure and certain means by which a governmental entity may be alerted to potential liability arising from governmental activity. *Friel v. Boise City Housing Authority*, 126 Idaho 484, 486, 887 P.2d 29, 31 (1994). Additionally, the claim notice requirement serves the purposes of saving needless expense and litigation by providing an opportunity for amiable resolution among the parties, of allowing the

governmental entity to conduct a full investigation into the cause of the injury in order to determine the extent of liability, if any, and of allowing the state to prepare defenses. *Id.* The notice provision of the ITCA is mandatory, and a plaintiff's failure to comply with it is fatal to a claim. *Magnuson Properties Partnership v. City of Coeur d'Alene*, 138 Idaho 166, 169-70, 59 P.3d 971, 974-75 (2002).

In addition, I.C. § 6-610 requires that a plaintiff filing a civil lawsuit against a "law enforcement officer"--which includes any correctional official--for a claim arising out of, or in the course of the performance of the officer's duty must file a bond at the same time that the plaintiff files the complaint. The purpose of the bond is to ensure diligent prosecution of the lawsuit and the payment of all costs and expenses, including a reasonable attorney fee, that may be awarded against the plaintiff. *Athay v. Stacey*, 146 Idaho 407, 412, 196 P.3d 325, 330 (2008). If the plaintiff does not file the bond, and the defendant law enforcement officer objects, then the court *must* dismiss the lawsuit. *Id.*[2]

It is undisputed that Abbott did not timely file notice of his claim pursuant to I.C. § 6-905, nor post the bond required by Section 6-610. He admitted as much at a hearing on the state's motion for summary judgment, requesting leniency because of his ignorance of the Act's requirements. However, the Act does not provide for such a defense, and neither does Abbott's *pro se* status create a legally valid excuse. *See Twin Falls Cty. v. Coates*, 139 Idaho 442, 445, 80 P.3d 1043, 1046 (2003) ("Pro se litigants are held to the same standards and rules as those represented by an attorney."). Accordingly, the district court did not err in granting summary judgment in regard to Abbott's tort claims.

D. Witness Testimony

Abbott last contends that he was denied the opportunity to present witnesses to support his motion for default and to respond to the Respondents' motion for summary judgment. This Court applies an abuse of discretion standard when determining whether testimony offered in

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[2] We note that there are very limited circumstances in which the bond requirement does not apply. A prisoner can escape the bond requirement by filing a motion and affidavit detailing the prisoner's assets, income, and indebtedness. I.C. § 31-3220A(2). The court must then decide whether to allow the prisoner to proceed and post a reduced bond or no bond at all. *Beehler v. Fremont Cty.*, 145 Idaho 656, 660, 182 P.3d 713, 717 (Ct. App. 2008). Here, while Abbott was incarcerated at the time he filed his claim, there is no indication that he filed a motion with the district court asserting indigency--nor does he argue as much on appeal.

connection with a motion for summary judgment is admissible. *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 15, 175 P.3d 172, 177 (2007); *McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC*, 144 Idaho 219, 221, 159 P.3d 856, 858 (2007).

Specifically, Abbott requested the transport of two inmate witnesses, Daniel Stewart and Will Lynn, for both the show cause hearing on October 4, 2007, and the hearing on the Respondents' summary judgment motion held on November 29, 2007. He also requested that a subpoena be issued for Correctional Officer Vincent and that the court declare him a hostile witness. The court denied each of these requests.

We conclude the district court did not abuse its discretion in denying Abbott the opportunity to present the testimony of Stewart, Lynn and Vincent. As discussed above, at issue in the court's consideration of the motion for default were the circumstances surrounding the service of the summons and complaint. In regard to a determination of whether summary judgment was appropriate the issues involved were whether Abbott had a protected property interest in his mail that implicated due process and whether Abbott complied with the notice and bond requirements of the ITCA. There is no indication that Stewart, Lynn or Vincent possessed relevant knowledge on these issues. The affidavit of Stewart discussed only that he was a witness to and played a role in the alleged illegal conduct by the Respondents in depriving Abbott of his mail. Likewise, the only reference made to Lynn's involvement or knowledge regarding Abbott's allegations against the Respondents is that Lynn had returned a magazine to Abbott. Finally, Abbott stated that Vincent would provide "valuable testimony of facts concerning the possession of the items so described as evidence in this case"--a topic which had no relevance to the considerations facing the court's decision in both the motion for default and later, the motion for summary judgment. Since the testimony that Abbott contends was erroneously excluded from the district court's consideration clearly was irrelevant to the salient issues before the court, we conclude the court did not abuse its discretion by denying the transport and subpoena requests for witnesses.

E. Attorney Fees Below

Abbott requests that the lower court's ruling awarding attorney fees and costs to the Respondents be denied in what he refers to as "a good faith attempt to right what has gone wrong." The award of attorney fees is left to the discretion of the trial court, and the burden is on the party disputing the award to show an abuse of discretion. *Anderson v. Ethington*, 103 Idaho

658, 660, 651 P.2d 923, 925 (1982). Without a clear showing that the district court abused its discretion, the award will not be set aside. *City of Nampa v. McGee*, 104 Idaho 63, 64, 656 P.2d 124, 125 (1982).

The district court granted the Respondents' request for attorney fees, first citing I.C. § 12-121, that fees may be appropriate against an inmate if the court is left "with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation." *See Drennon v. Hales*, 138 Idaho 850, 854, 70 P.3d 688, 692 (Ct. App. 2003). The court found that, after having reviewed the record, it was left with the belief that Abbott had pursued his suit frivolously, unreasonably or without foundation. The court also noted that under I.C. § 31-3220A(16), it was required to award reasonable costs and attorney fees to a defendant if the court concluded that "[t]he action or any part of the action is frivolous or malicious" or "[t]he action or any part of the action is dismissed for failure to state a claim upon which relief can be granted." The court concluded that having found both grounds, an award of attorney fees was proper.

The district court, however, failed to recognize that in regard to claims brought under the ITCA, I.C. § 6-918A of the Act is the exclusive provision for awarding attorney fees, including claims on appeal. *Beehler v. Fremont Cty*, 145 Idaho 656, 661, 182 P.3d 713, 718 (Ct. App. 2008). *See also Nation v. State Dep't. of Corr.*, 144 Idaho 177, 194, 158 P.3d 953, 970 (2007); *Jensen v. State*, 139 Idaho 57, 64-65, 72 P.3d 897, 904-05 (2003); *Packard v. Joint Sch. Dist. No. 171*, 104 Idaho 604, 614, 661 P.2d 770, 780 (Ct. App. 1983).

Nevertheless, the district court was correct that an award of attorney fees *may* be granted under I.C. § 12-121 to the prevailing party when the court is left with the abiding belief that the appeal has been brought or defended frivolously, unreasonably, or without foundation, *Rendon v. Paskett*, 126 Idaho 944, 945, 894 P.2d 775, 776 (Ct. App. 1995), and that under I.C. § 31-3220A(16), fees and costs *shall* be awarded to the defendant if the action was frivolous or malicious or any part of the action was dismissed for failure to state a claim upon which relief can be granted. Since the directive of I.C. § 31-3220A(16) is mandatory, and we have affirmed the district court's dismissal of Abbott's due process claim for failure to state a claim upon which relief can be granted, we affirm the court's grant of costs and attorney fees.

F. Attorney Fees on Appeal

On appeal, the Respondents' request the award of attorney fees pursuant to I.C. §§ 12-121 and 31-3220A(16). Specifically, they argue that the lower court's rulings on Abbott's motion for default and the Respondents' motion for summary judgment were based on application of well-settled law and that Abbott has failed, on appeal, to put forth any argument or authority indicating that the district court misinterpreted or wrongly applied the law to the issues before it, instead focusing solely in rehashing his arguments regarding the Respondents' actions upon which he based his original claims and upon claims of bias by the district court which are not supported by the record.

As we stated above, as to claims brought under the ITCA, I.C. § 6-918A of the Act is the exclusive provision for awarding attorney fees, including claims on appeal. *Beehler*, 145 Idaho at 661, 182 P.3d at 718. However, as we also discussed above, I.C. § 32-3220A(16) requires the award of reasonable costs and attorney fees to a defendant or respondent if, among other things, "[t]he action or any part of the action is dismissed for failure to state a claim upon which relief can be granted." Having affirmed the district court's grant of the Respondents' motion for summary judgment in regard to Abbott's due process claim, we award costs and attorney fees to the Respondents.

III.
CONCLUSION

We affirm the district court's denial of Abbott's request for partial waiver of transcript costs, his motion for default judgment, and his request to present witness testimony at the default and summary judgment hearings. We also affirm the court's grant of the Respondents' motion for summary judgment on his due process and tort claims. We affirm the district court's award of attorney fees to the Respondents below, and we grant Respondents, as the prevailing party on appeal, attorney fees and costs, pursuant to I.A.R. 40 and 41.

Judge PERRY and Judge GRATTON **CONCUR**.